UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)

CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA, PLAINTIFF,

vs.

STEVEN DALE GREEN, DEFENDANT.

DEFENDANT'S MOTION FOR DISMISSAL OF THE INDICTMENT, GRAND JURY RELATED DISCOVERY, AND APPROPRIATE SANCTIONS

Comes the defendant, Steven Dale Green, by counsel and moves the Court to compel the production of grand jury related materials, specifically all grand jury subpoenas issued, enforced or pending enforcement post indictment, transcripts of grand jury witnesses, and the instructions given to the grand jury with regard to the "special findings" contained in the indictment. The defendant also moves this Court to order the government to withdraw any grand jury subpoenas that were not returned to the grand jury prior to indictment, to dismiss the indictment and/or for appropriate sanctions to address the governmental abuse and misuse of the powers of the grand jury in this case.

The defendant makes these requests pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, and the Fifth, Sixth and Eighth Amendments to the United States

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Constitution.

INTRODUCTION AND FACTUAL BACKGROUND

These motions arise out of information that has come to the attention of defense counsel indicating multiple abuses of the subpoena power of the grand jury, including post indictment grand jury subpoena enforcement by the case agent, and the prosecutorial abuse of the power of the grand jury by compelling the testimony of defendant's family and friends regarding matters outside the scope of the grand jury's power to investigate. In order to make the factual record clear, and to provide the Court and counsel with the best evidence of the misconduct in this case, the defendant seeks discovery of relevant materials that are in the possession of the government.

On October 26, 2006, defendant filed a motion to quash grand jury subpoenas compelling the testimony of his father, stepmother, and brother. Subpoenas were served on October 17, 2006, compelling testimony for October 24, 2006. A supplemental motion to quash was filed on October 30 to include defendant's sister, who was subpoenaed on October 26, for testimony on November 1. The motions argued that the subpoenas sought penalty phase and mitigation testimony which was beyond the power of the grand jury to obtain; violated due process and the Eighth Amendment by compelling the testimony of otherwise unwilling close family members and; violated the understanding between the parties regarding *foreign* discovery that gave rise to the unopposed extension of time to indict; and inappropriately subpoenaed defendant's phone calls from the jail to family and friends.

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The government responded that defendant had not met his burden of demonstrating that the challenged subpoenas were outside the power of the grand jury; that the grand jury had the power to investigate whether family members had direct knowledge of defendant's participation in the alleged crimes; that under Ring, the "eligibility" factors must be charged in the indictment, and relatives may have evidence of defendant's intent and mental state; and finally, that the monitoring of jail inmate calls did not violate the Fourth Amendment.

On, October 30, 2006, the court denied the motions to quash determining that defendant had not demonstrated that the grand jury testimony of his family members was not relevant to whether he committed the crime, or the aggravating factors that must be charged in the indictment. The various family members testified before the grand jury; and within hours of the last witness on November 1, 2006, the indictment was returned.

Upon information and belief, various family members of defendant were questioned before the grand jury about topics entirely unrelated to any direct evidence of guilt or to one of the "special findings" mental states:

- what kinds of books defendant read, including whether any books were about World War II
- whether defendant had problems or fights in school and the content of parent-teacher conferences
- whether or not defendant used illegal drugs or drank alcohol
- whether or not defendant had vision or hearing problems
- whether defendant was ever on medication
- whether defendant played with fire or fireworks

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- defendant's relationship with his mother and whether or not she was upset about the charges against him
- why defendant moved in with his father
- where defendant lived at various times in his life
- what they and defendant talked about during post arrest visits and who was present
- why defendant joined the Army, whether he liked basic training, and whether he was interested in guns
- whether defendant had a learning disability
- "to tell positive things about" defendant
- whether other family or friends thought defendant was guilty
- whether defendant was a risk taker and whether he was smart
- whether defendant had any girlfriends
- whether defendant was ever violent
- whether or not defendant was cruel to animals
- defendant's high school extracurricular activities

Witnesses who have spoken with the defense after their grand jury appearances also indicate that they were questioned about various recorded calls defendant made to them from the jail. One witness was apparently questioned about whether or not defense counsel had told them what to say, and asked why she had declined to be interviewed by the prosecution prior to testifying before the Grand Jury.[1]

[1]The witness advised that she was promised by an FBI agent that if she talked with the FBI, she would not be subpoenaed to the grand jury. Relying on this assurance, she had talked with the FBI, but was still subpoenaed to testify.

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After the indictment was returned, FBI Special Agent Frank Charles contacted the detention facility where defendant is housed and asked that the facility respond to a grand jury subpoena that had been issued for telephone calls between 10/6/06 and 11/1/06 (the date the indictment was returned). The Agent also asked the facility to "go back and search for phone calls" to specific numbers. See Attachment A attached hereto. In addition, defense counsel understands that there is another outstanding grand jury subpoena for defendant's military medical and psychiatric records.

ARGUMENT

Discovery of Grand Jury Transcripts and Post Indictment Subpoenas. Fed. R. Crim. P. 6(e)(3)(E) provides that "[t]he court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury...." The Court has the discretion to punish abuse of a grand jury by dismissing the indictment. See e.g., United States v. Breitkreutz, 977 F.2d 214 (6th Cir. 1992) (standard for reviewing whether an indictment should have been dismissed for misuse of the grand jury is abuse of discretion). The Court also has the discretion to order production of grand jury transcripts upon a showing of "particularized need." See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959).[2]

Here, thus far, defense counsel are aware of several apparent instances of misuse and

[2]Should the court not find cause for production on the basis of this motion, it is requested that the court review the transcripts in camera.

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abuse of the grand jury which give rise to the "particularized need" to produce grand jury transcripts and the post indictment subpoenas and/or efforts to enforce grand jury subpoenas post indictment:

(1) Defendant's family members report being quizzed about a wide range of topics, including those that have no apparent relationship to the charges, the "special findings," or defendant's mental state at the time of the offenses.[3] Indeed, as the areas noted above reveal, much of the questioning appears to go to defendant's "life history" or the kinds of information that a mitigation investigator would be interested in to develop a social history for a capital case penalty phase. [4]

(2) The Government, though FBI Agent Charles, has abused the power of the grand jury in seeking compliance with subpoenas after the return of the indictment.[5] See Attachment A (memo from Agent Charles to detention facility seeking compliance with

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[3]One family member reportedly asked for a copy of the transcript of his testimony and was told that he could not have it.

[4]As noted in the defendant's sealed Motion to Quash, in the first publicly available primer for federal prosecutors on the federal death penalty, government attorneys are urged to speak to anyone who may have known the defendant "to undermine the potential case in mitigation." See D. Novak, Anatomy of a Federal Death Penalty Prosecution: a Primer for Prosecutors, 50 S.C. L. Rev. 645, 671-672 (1999). By using the grand jury, federal prosecutors can not only seek to speak with potential mitigation witnesses, but can compel them to speak under the threat of contempt, as part of the government's attempt to "undermine the potential case in mitigation." This unilateral right to compel testimony regarding mitigation, or aggravation, when the defendant has no equivalent power, creates an imbalance that could well tip the scales in favor of death. The grand jury subpoena power was never meant to create such an unfair advantage for the government in any case, particularly in a capital case.

[5]The Court previously ruled that subpoenas to the detention facility for Steven Green's telephone calls were proper. This issue has not been fully briefed, and will be the subject of later motions to suppress and/or to limit the use of the information.

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outstanding grand jury subpoena and additional information not obtained through earlier subpoenas). The United States must concede that the grand jury's subpoena power cannot be used, as it was here, after indictment to gather evidence, conduct pretrial discovery, or otherwise engage in preparation for the trial of a defendant. See United States v. Phibbs, 999 F.2d 1053, 1076-77 (6th Cir. 1993); see also, e.g., United States v. Doss, 563 F.2d 265, 276 (6th Cir. 1977)(en banc) (government could not use Grand Jury to obtain evidence from a defendant regarding a charge for which the Grand Jury had already indicted the defendant).[6]

(3) One witness who was questioned about why she had refused to meet with the prosecutors before her grand jury testimony had been led to believe that if she spoke with FBI agents, she would not be subpoenaed to testify before the grand jury. She talked, and was still subpoenaed.

Instructions to the Grand Jury. As part of its response to the earlier Motions to Quash Grand Jury Subpoenas, the United States argued it was required to present evidence of the "special findings" to the grand jury, as those findings are the "functional equivalent of elements" of the capital offenses. Though this Ring related issue of indicting on "special findings" has not been settled by the United States Supreme Court, and will ultimately be challenged here should this case proceed as a capital prosecution, the government's position raises the question of how the grand jury was instructed regarding the "special findings", and whether or not the grand jury was advised that its decision to return these "special findings"

[6]Consequently, any outstanding Grand Jury subpoenas must be withdrawn. As noted above, there is apparently at least one outstanding Grand Jury subpoena seeking Mr. Green's military medical and psychiatric records.

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would make defendant eligible for capital punishment. Indeed, failure to properly instruct the grand jury is another form of misconduct or abuse of the grand jury.

A unique feature of the grand jury is its *unfettered discretion* in a capital case to indict, if at all, for a lesser or a noncapital offense, even in the face of overwhelming evidence of guilt. As the Supreme Court noted in Vasquez v. Hillery, 474 U.S. 254, 263 (1986):

> In the hands of the grand jury lies that power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense--all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting).

It follows inexorably that unless the grand jury is made aware both that it is sitting in a potential capital case and that it has the unfettered power "to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense", Hillery, supra, it is deprived of its historical independence, and more importantly for a capital case, it is deprived of its Eighth Amendment function of ensuring the capitally-accused uniformity, individualization, proportionality, and reliability. See, e.g., Beck v. Alabama, 447 U.S. 625 (1980) (the "significant constitutional difference between the death penalty and lesser punishments" renders it all the more important to provide the jury the opportunity to charge a lesser offense, rather than capital murder or nothing at all, as the "all or nothing" approach "would seem inevitably to enhance the risk of an unwarranted conviction," a risk which cannot be tolerated in the death penalty context).

WHEREFORE, it is respectfully requested that this Court 1) grant the requested

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discovery of transcripts, post indictment subpoenas, and the instructions to the Grand Jury; 2) hold a hearing on these issues; and 3) impose appropriate sanctions, including direction that outstanding Grand Jury subpoenas be withdrawn, and dismissal of the indictment.

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Counsel for Defendant.

CERTIFICATE

I hereby certify that on January 19, 2007, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Assistant United States Attorney.

/s/ Scott T. Wendelsdorf

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